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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT ..... *Appellant,*

v. No. 72

HOBBS TIE & TIMBER COMPANY, A CORPORATION *Appellee.*

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FROM WHICH A CERTIFIED QUESTION IS SUBMITTED.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF FACT

On the 27th day of September, 1921, J. L. Cunningham and wife, Henrietta E. Cunningham, made, executed and delivered to the Holland Banking Company of Springfield, Missouri, their promissory note in the sum of $76,000, due and payable on the first day of October, 1924, bearing interest at 7 per cent, and on the same day, and to secure said note, together with

the interest thereon, made, executed and delivered to said bank a mortgage deed covering about 12,000 acres of rough timber land in Northwest Arkansas.

There were several payments from time to time on the above mortgage, thereby keeping it from becoming barred by the Statute of Limitations, until the 19th of March, 1929, there was due, with principal and accrued interest, approximately $66,000.

The Holland Banking Company in the summer of 1926 became insolvent and was taken over by the State Banking Department of the State of Missouri for liquidation, and among its assets was this Cunningham note and mortgage. On the 20th day of October, 1928, the liquidating agent of the Holland Banking Company applied to the circuit court of Greene County, Missouri, which court had jurisdiction over the liquidation of State banks in that county, for an order of sale of said note, and the same was sold to the appellee Hobbs Tie & Timber Company at and for the sum of $30,000, which sale was duly approved by said court. At that time the equity of redemption in the above lands was in T. P. Perkins of Palo Pinto, Texas, the same having been deeded to him by the Cunninghams on the 18th of April, 1924, subject to the mortgage of the banking company, the deed being a straight warranty deed without disclosing any trust, and thereafter Perkins made several payments on the note. Soon after this J. L. Cunningham died, and whatever interest he had in the equity of redemption, if any, went to his widow, the present bankrupt. On the 29th day of October, 1928,

nine days after the note had been purchased by the appellee from the Holland Banking Company, a deed was filed from T. P. Perkins to the appellant, trustee in bankruptcy, subject to the mortgage of the Holland Banking Company. On the 14th day of September, 1928, the said Henrietta E. Cunningham was adjudicated a bankrupt by the District Court of the United States for the Northern District of Texas and the Fort Worth Division, and the appellant was appointed trustee in bankruptcy.

On the 12th of December, 1928, the Hobbs Tie & Timber Company filed its suit in the chancery court of Benton County, Arkansas, the county in which a large portion of the lands were located, a suit to foreclose the mortgage executed in 1921 by Cunningham and wife, and the appellant, as trustee in bankruptcy, was made a party to that suit, and constructive service issued, and on the 10th day of January, 1929, the appellant, as trustee in bankruptcy, entered his voluntary appearance in the Benton County, Arkansas, Chancery Court, and filed a petition for removal of the case to the District Court of the United States for the Western District of Arkansas and the Fort Smith Division thereof, on the ground of diversity of citizenship (Tr. 15). Upon this petition an order of removal was made by the chancellor (Tr. 18), and the cause was transferred to the District Court of the United States for the Western District of Arkansas and the Fort Smith Division, and on the 11th of February, 1929, the appel-

lant, as trustee in bankruptcy, filed an answer in said court (Tr. 20-25).

In this answer the validity of the lien of the appellee was admitted; the amount due on the note was admitted, and all of the material allegations of the petition to foreclose were admitted, but he alleged that there was an equity of some sixty thousand dollars in the real estate sought to be foreclosed, and that the plaintiff was foreclosing hoping to be able to buy the property at the foreclosure sale for the amount of the indebtedness, and that the United States District Court for the Western District of Arkansas was without jurisdiction to order a sale to satisfy the lien.

On February 28, 1929, the appellee filed a motion to dismiss the answer and for judgment on the pleadings (Record 26), setting up that the answer set forth no defense to the foreclosure proceedings; that the validity of the note and the lien on said lands was admitted; the amount alleged to be due was admitted, and that all allegations made in the answer in reference to the value of the equity was a matter that could be taken care of and preserved in the distribution of the proceeds of the sale of the real estate, and this motion asked that the answer be dismissed so far as it undertook to delay the foreclosure, or to its allegations in reference to a want of jurisdiction of the court. There was an amendment filed, alleging that on the 14th of September, 1928, the day that the trustee in bankruptcy was appointed, the referee for the Bankrupt Court of the Northern District of Texas had made an

order authorizing and directing the trustee to "offer for sale and sell all or any part of the estate of the bankrupt aforesaid at public or private sale, for cash or on terms, and subject to or free of liens."

The motion for judgment on the pleadings was argued on the 19th of March, 1929, and a decree was rendered ascertaining the amount due under the mortgage, declaring it to be a first and prior lien against the lands covered by the mortgage, and a sale was ordered to satisfy the lien, and a special master appointed to carry out the decree. This sale was advertised for the 6th day of May, 1929. In the meantime the appellant had perfected an appeal to United States Circuit Court of Appeals, and, as the record discloses, on the 23rd day of May an application was made to that court sitting at Kansas City, for a stay of the sale without a bond being executed by the trustee. Upon a hearing this motion was denied, but the appellant was given the privilege, under an order, of executing a bond for $3,500 to pay interest that might accrue after the 6th of May, and all costs. This bond was not given, and the sale was duly held on the 6th of May, and the land sold by the master for the amount of the judgment, interest and costs to that date.

It will be observed that neither the Holland Banking Company, the prior holder of the mortgage, nor the Hobbs Tie & Timber Company, which purchased it from the Bank Commissioner of the State of Missouri, entered any appearance in the bankruptcy court for the Northern District of Texas and filed no claim

[illegible]

effect that the mortgagee may elect whether to foreclose in the bankruptcy court or not and "coupled with that assertion is the assumption that there is no restriction of his right to proceed elsewhere." In reply to this, will say that we think they are entirely in error, and that the right of the mortgagee under the facts in this case, to elect whether he will proceed to foreclose in some other court and remain out of the bankrupt court is a matter entirely within his rights.

FILING A PETITION TO REMOVE FROM THE STATE COURT AND INVOKING THE JURISDICTION OF THE UNITED STATES DISTRICT COURT, THE APPELLANT WOULD BE ESTOPPED TO QUESTION THE JURISDICTION OF SAID COURT TO WHICH HE PROCURED A REMOVAL.

The appellant herein, in paragraph five of his answer, as set forth on page twenty-two of the record in this case, raises the sole question involved on this appeal by objecting to the jurisdiction of the trial court, in the following language:

"This honorable court has no power, jurisdiction or authority by reason of the premises to administer upon said property by determining when the same shall be sold, how the same shall be sold, or to order a sale thereof, these matters being solely and exclusively matters of administration for the District Court of the United States for the Northern District of Texas at Fort Worth sitting in bankruptcy."

And the only relief prayed for by appellant in his answer is as follows:

"Wherefore this defendant prays that, upon hearing hereof, the court establish and fix the lien, claims and interest of the plaintiff and the various defendants herein, and thereupon proceed further with this suit; that the prayer of the plaintiff that said property be ordered sold be in all things denied."

The only question raised by appellant in the trial court was as to the jurisdiction of said court to order a sale of the property and lands involved. The appellee, in effect, demurred to this answer or allegation that the trial court had no jurisdiction to make an order of sale, and we submit that this question has been settled by the decisions of this court and the various Circuit Courts of Appeal, in the case of *Tootle et al.* v. *Coleman et al.*, 107 Fed. 41, 45 said:

> "It follows from this conclusion that the State court obtained sufficient jurisdiction of the subject of this action and of the defendants by the garnishment and the service of the summons upon the defendants by publication to authorize the disposition of the moneys due from the garnishees by the judgment of the court, and the defendants are estopped by their removal of the cause from attacking the jurisdiction of the Federal court on any other ground. It does not lie in the mouth of one who has removed a case from the State to the Federal court to claim that the latter has no jurisdiction of the case, except upon the ground that the court from which it was removed was without jurisdiction. *Cowley* v. *Railroad Co.*, 159 U. S.

569, 583, 16 Sup. Ct. 127, 40 L. ed. 263; *Purdy* v. *Wallace Muller & Co.* (C. C.) 81 Fed. 513, 515."

In the case of *Cowley* v. *Railroad Co.*, 159 U. S. 569, 583, which is cited by Judge Sanborn in the above opinion, the Supreme Court of the United States said:

> "The case having been removed to the circuit court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction."

It is nowhere contended by appellant that the court from which this case was removed, to-wit, the chancery court of Benton County, Arkansas, had no jurisdiction to hear and determine the matters alleged in plaintiff's complaint, and it was upon appellant's petition that the cause was removed to the United States District Court, and having invoked the jurisdiction of that court, we submit it does not lie within his mouth to claim that such court had no jurisdiction to make the order of sale or to make any final disposition of the case in that court.

The appellant argues strenuously that the bankruptcy court for the Northern District of Texas had complete administrative jurisdiction of the estate of the bankrupt, and for that reason we were precluded from seeking a remedy in the lower court, and cites many authorities on the general proposition of a conflict between bankruptcy courts of primary jurisdiction and courts of ancillary jurisdiction, none of which

are applicable to the facts in this case. The appellant assumes a very arbitrary position in this case. If his contention is true, let us see what the effect would be. If a resident of New York, California or the Hawaiian Islands should own real estate in Arkansas and on which he had executed a mortgage thereby transferring the legal title to the mortgage many years ago, should go into bankruptcy through the bankruptcy court of the district in which he resides, then under the contention of the appellant, before the mortgagee could foreclose the lien, about which there is no question as to its validity, he would have to go to the bankrupt court in New York, California or the Hawaiian Islands, as the case might be, and submit himself to the jurisdiction of that court and seek a foreclosure therein or procure a waiver of the trustee to any claim to the equity of redemption, and if that court saw fit to deny the right to foreclose, he would necessarily have to go to the appellate court of that district, procure a reversal, then an order, and come back to the local jurisdiction to assert his rights.

The appellant relies specially on the cases of *Robertson* v. *Howard*, 229 U. S. 254; *Herbert* v. *Crawford*, 228 U. S. 204; *Murphy* v. *Hoffman*, 211 U. S. 562; *In re Patterson Lumber Company*, 247 Fed. 578; *Lazarus* v. *Prentice*, 234 U. S. 263; and other similar cases.

In this case we do not think it should be conceded that the District Court of the United States for the Western District of Arkansas, at the time the decree

was rendered in this case, was sitting as an ancillary court of bankruptcy. This was a bill in equity to foreclose a mortgage, but conceding for the sake of argument that it was sitting as an ancillary court, we then contend that it did have jurisdiction to foreclose the mortgage and order the sale.

In re Rodgers v. *Garrett Timber Co.*, 22 Fed (2) 571, is a case which lays down the true rule and which has been followed by this court and in other decisions which we shall later cite. Judge Coleman of the District Court for the District of Maryland says as follows:

> "In the nature of things, an ancillary receiver must be subject alone to and obey the orders of that court of which he is an officer, so obeying it follows that to it alone he must account. Any other course would breed confusion in the administration and go far towards making the exercise of ancillary jurisdiction impracticable, and if a court, in pursuance of comity, undertakes to exercise ancillary jurisdiction by administering local assets which it alone has power and jurisdiction to administer, it follows that his hand must be free to administer by its own officer and to exact from him the full measure of duty, such executive work it can only secure from an officer answerable to it alone. *Kirker* v. *Owings*, 98 Fed. 511; *Sands* v. *Neeley*, 88 Fed. 133; *In re Isaacson*, 174 Fed. 406; *Ames* v. *U. P. Ry. Co.*, 60 Fed. 966."

The court further in that opinion says:

> "The weight of authority supports what seems to be the proper rule, namely, that a court

of ancillary jurisdiction has power to determine priorities and liens in regard to property brought within its jurisdiction, and to pass such orders as may be necessary in connection with the *satisfaction of same. Fidelity Trust Co.* v. *Gaskell* (C. C. A.), 195 Fed. 865; *Emerson* v. *Castor, supra; In re Einstein* (D. C.) 245 Fed. 189; *Story & Clark Piano Co.* v. *Holmes* (C. C. A.) 251 Fed. 565; *Murphy* v. *John Hoffman Co.*, 2 U. S. 562."

In the case of *In re Patterson Lumber Company*, one of the cases relied upon by the appellant in this case, the above principle was doubted on the authority of *Lazarus* v. *Prentice*, 234 U. S. 263, but a careful examination of the Lazarus case discloses that the court there held that an ancillary jurisdiction could not decide whether a claim arising *subsequent* to bankruptcy ought to be allowed.

The facts in the Lazarus case, relied upon by appellant, are that Antonio Musica & Phillip Musica were partners in New York City; that they became largely indebted, and on involuntary petition were adjudicated bankrupts on the 19th of March, 1913, and a receiver was appointed, and on the same day the petition was filed the bankrupts were arrested as fugitives from justice in the city of New Orleans. Upon search there was found upon their persons $75,000 in money and $50,000 in notes and mortgages. Upon the admission of the parties it was practically apparent that the property belonged to the bankrupt estate, and upon a petition filed by the receiver from the New York court the District Court of the United States for the Eastern

District of Louisiana ordered the property turned over to the receiver from the bankrupt court of New York.

Lazarus, Michael & Lazarus, a firm of lawyers in New Orleans, filed an intervention claiming a fee of $15,000 for representing the Musicas in that proceeding against them in the courts of Lóuisiana, and asked the court to allow the fee and subject the fund taken from the person of the bankrupt to its payment. The petition was dismissed on the grounds that the fund at that time was in *custodia legis* in the bankruptcy court of New York, and that the claim would have to be presented there. An appeal was taken to the Court of Appeals, which affirmed the lower court, and to the Supreme Court of the United States, and the court in that opinion says:

> "The filing of the petition and adjudication in the bankrupt court in New York brought the property of the bankrupts, wherever situated, into *custodia legis*, and it was thus held from the date of the filing of the petition, so that *subsequent* liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law."

It will be noted from the opinion in this case that the court was simply passing upon the right of the parties to the enforcement of an alleged lien sought to be acquired *after* bankruptcy over an alleged lien sought to be enforced after bankruptcy, and with reference to a fund or personal property which was in the

actual and physical possession of the bankruptcy court of original jurisdiction, and the court further says:

> "There is no contention that Lazarus, Michael & Lazarus had any lien upon this property at the time of the apprehension of the parties and the seizure of the property. Whatever rights they had are asserted to arise by virtue of the assignments made April 1, 1913, and *after the filing* of the original petition in bankruptcy."

In the other leading case relied upon by appellant, the case of *Robertson* v. *Howard*, 229 U. S. 254, in which it was held that the court of primary jurisdiction had the right to sell certain certificates of purchase of lands owned by the bankrupt, the bankruptcy court being in the Southern District of Illinois, and a certificate of purchase covering lands in the State of Kansas, the facts are that the bankrupt in that case was adjudicated in the Southern District of Illinois. The bankrupt was the owner by assignment of two certificates, each reciting the purchase from the State of Kansas of a particular quarter section of school land and of making of a partial payment therefor and the right to receive from the State a deed to the land upon the payment of the balance due. The certificates were placed in the bankruptcy schedules. Upon the petition of the trustee the referee ordered the sale at public auction, after ten days' notice by publication in a newspaper of general circulation published in Cass County, Illinois, and the certificates were sold under that order. Afterwards the controversy came up about the juris-

diction of the bankrupt court in the Southern District of Illinois to order these certificates sold, between a purchaser of the lands at a tax sale and the assignee in bankruptcy of these certificates, the assignee of the certificates having tendered the money to pay all taxes and having paid the State of Kansas the balance due under the certificates, and no question was raised as to the validity of the certificates, and the Supreme Court held that, as only the certificates of purchase were sold, it was unnecessary to comply with the Federal statutes providing the manner of sale of real estate of the bankrupt, and that the district court in Southern Illinois therefore had jurisdiction.

In the other case of *Dayton* v. *Stanard*, 241 U. S. 588, relied upon by appellant, the matter involved was the attempted enforcement of a lien attempted to be acquired after bankruptcy, and all of the other authorities cited in appellant's brief, after a careful study and reading of these authorities, we find involved liens in the same condition and not liens acquired many years prior to bankruptcy, as in the instant case, and in regard to which there was no question as to the validity.

In the Fourth Circuit Judge Waddill, in *Tidewater Plumbing Company* v. *Schimmel*, 296 Fed. 459, held, following *Lazarus* v. *Prentice*, *supra*, that proceedings to recover funds expended by the bankrupt *after* bankruptcy ought not to be allowed in an ancillary jurisdiction, and said:

"While there are many cases in which courts of ancillary jurisdiction should administer the fund under their control settling and determining the liens thereon and the rights of the parties thereto, still a case like this, with the fund not actually in court, the same being confessedly a part of the bankrupt's estate and diverted *after* the bankruptcy, it should be paid and transferred over to be administered under decrees and orders of the court of original jurisdiction."

This court has repeatedly refused to follow the rule contended for by appellant, and in the case of *Fidelity Trust Company* v. *Gaskell*, from this court, reported in 195 Fed. page 865, opinion by Judge Sanborn, the very questions involved by this appeal are thoroughly discussed, and in that opinion he says:

"It is true that prior to the year 1910 this court was of the opinion that the district courts of the United States had no ancillary jurisdiction in bankruptcy proceedings, and that the court of original jurisdiction had the power to determine the title, the right to the possession and the existence of liens upon specific property claimed as a part of the bankrupt's estate situated in other districts, and the power to enforce its decisions in those districts. *In re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316; *In re Dempster*, 172 Fed. 353, 355, 356, 97 C. C. A. 51. But in January, 1910, the Supreme Court decided, in *Babbitt* v. *Dutcher*, 216 U. S. 102, 110, 114, 30 Sup. Ct. 372, 54, L. ed. 402, 17 Ann. Cas. 969, and in *Elkus, Petitioner*, 216 U. S. 115, 117, 30 Sup. Ct. 377, 378 (54 L. ed. 407), that the respective district courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in

aid of proceedings pending and being administered in the district court of another district, and the Congress in June of that year enacted that the district courts 'are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held to * * * (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits, in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy. Bankr. Act July 1, 1898, c. 541, 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), as amended by Act June 25, 1910, c. 412, 2, 36 Stat. (Part. 1) 839 (U. S. Comp. St. Supp. 1911, p. 1491).

"Moreover, it seems to be settled by the decisions in *Babbitt* v. *Dutcher*, and other cases, that the limitation of section 2 of the Bankruptcy Act of the jurisdiction granted to the district courts in bankruptcy to 'their respective territorial limits' restricts the exercise of the power of a district court in which a petition in bankruptcy is filed to its own district, and that it may not enforce its process or its order for the delivery of property without the territorial limits of its district. *Lathrop* v. *Drake*, 91 U. S. 516, 517, 23 L. ed. 414; *Babbitt* v. *Dutcher*, 216 U. S. 102, 110, 30, Sup. Ct. 372, 54 L. ed. 402, 17 Ann. Cas. 969; *Staunton* v. *Wooden*, 179 Fed. 61, 64, 102 C. C. A. 355; *In re Peiser* (D. C.) 115 Fed. 199, 200; *In re Sutter Bros.* (D. C.) 131 Fed. 654; *In re Benedict* (D. C.) 140 Fed. 55; *In re Robinson* (D. C.) 179 Fed. 724.

"It is therefore no longer true that one court, the court making the adjudication in bankruptcy, takes exclusive jurisdiction and alone collects and determines the titles to and liens upon the property wherever situated claimed as part of the estate of the bankrupt. It was undoubtedly because this was not true, and because the court of primary jurisdiction in New York had no power to enforce its process or its order for the seizure or delivery of the property here in question situated in the State of Missouri, that the ancillary jurisdiction of the court below was invoked. The earlier conclusion of this court, therefore, to the effect that the district courts sitting in bankruptcy had no ancillary jurisdiction, and the arguments in its opinions that were believed to sustain that view, are no longer authoritative. We turn to the consideration of the rights and remedies of parties under the decisions of the Supreme Court and the Act of Congress, to which reference has been made.

"A proceeding in bankruptcy is a proceeding in equity, and a district court sitting in bankruptcy, whether it is exercising its primary or its ancillary jurisdiction, is a court of equity. It is an established principle of equity jurisprudence that whenever a court of chancery takes into its legal custody, and thereby withdraws and withholds property from replevin, attachment, or other legal proceedings, it hears and adjudges the claims to the title and to legal and equitable liens upon that property of all parties who intervene in the suit or proceeding before it in their own behalf and submit their claims to its adjudication. By this rule the power inhered in and the duty was imposed upon the court below to hear the petition of the intervener to decide whether the stock of goods seized and held was the property of the

bankrupt's estate or of the Beeson firm, and according to its decision to deliver its proceeds to the trustees of that estate or to the Beeson firm and its creditors."

This court in that decision, defining what *custodia legis* means, further says:

"It is true that the Supreme Court once said that the filing of a petition in bankruptcy 'is a caveat to all the world and in effect an attachment and injunction' (*Mueller* v. *Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. ed. 405), that the adjudication in bankruptcy puts the property of the bankrupt in *custodia legis*, and that its title vests in the trustee upon his appointment. But the later decisions of that court adjudge that the statement quoted applies only to parties who have no substantial claim of a lien upon or title to the property claimed as that of the bankrupt, and that against those who have such claims of existing titles or liens when the petition in bankruptcy is filed, its filing is neither a caveat nor an attachment, that it creates no lien, and that they are strangers to the proceedings in the absence of an order or process making them parties, or some equivalent notice. *Jaquith* v. *Rowley*, 188 U. S. 620, 625, 23 Sup. Ct. 369, 47 L. ed. 620; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, 352, 353, 26 Sup. Ct. 481, 50 L. ed. 782; *Hiscock* v. *Varick Bank of New York*, 206 U. S. 28, 41, 27 Sup. Ct. 681, 51 L. ed. 945; *In re Ratham*, 183 Fed. 913, 924, 106 C. A. 253."

This court, in *Fidelity Trust Company* v. *Gaskell*, *supra*, further says:

"Ancillary jurisdiction is a term which has a plain and well-known meaning in the equity juris-

prudence of the United States, a meaning fixed by settled practice and adjudged by the uniform current of the decisions of the courts of the United States. As neither the court nor the Congress modified or limited the term, the unavoidable presumption is that they used it, and intended to use it, in its recognized legal significance. In that significance, ancillary jurisdiction includes the power to hear and adjudge, at the request of interveners, their claims of title to, or legal or equitable liens upon, the property it takes, or holds in its legal custody, by virtue of that jurisdiction and to send the proceeds to the court of original jurisdiction, *or to apply it to the discharge of the claims* of the interveners in accord with its decision. *Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130, 132, 31 C. C. A. 424; Streets Federal Equity Practice, 1560; *Clyde* v. *Richmond & D. R. Co.* (C. C.) 65 Fed. 336, 338, 340; *McGraw* v. *Mott*, 162 Fed. 1006, 87 C. C. A. 678; *McGraw* v. *Mott*, 179 Fed. 646, 654, 103 C. A. 204; *Chattanooga Terminal Ry. Co.* v. *Felton* (C. C.) 69 Fed. 273, 283, 285; *Central Trust Company* v. *East Tennessee, V. & G. Ry. Co.* (C. C.) 69 Fed. 658, 663; *Jones* v. *Central Trust Co.*, 73 Fed. 568, 19 (C. C. A.) 569. A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction, or of its officers, and for itself. It appoints its own receiver, generally the same person appointed receiver by the court of primary jurisdiction, but in the seizure, management, sale, and distribution of the property seized within the territorial limits of the district, of which it takes the legal custody, this receiver is, and must be, governed by its orders exclusively. He may not justify any action by any orders of the court of primary jurisdiction. *Kirker* v. *Owings*, 98 Fed. 499, 511, 39 C. C. A. 132, 144;

Reynolds v. *Stockton*, 140 U. S. 254, 272, 11 Sup. Ct. 773, 35 L. ed. 464."

From the above decisions of this and the Supreme Court of the United States, we think it is well settled that the court of ancillary jurisdiction has power to determine liens in regard to property within its jurisdiction and to pass such orders as may be necessary in connection with the *satisfaction* of such liens, such as a decree of foreclosure, the appointment of a master or receiver to carry out the same.

ORDER OF REFEREE TO SELL FREE OR CLEAR OF LIENS

The appellant relies upon an order made by the referee in bankruptcy for the Northern District of Texas directing the trustee to sell the property of the bankrupt free or clear of liens, at public or private sale, for cash or on time.

This order, if carried out, would have been void as to the appellee, the appellee not having been brought into the bankrupt court by any notice and the trustee being without authority, without an ancillary proceeding of the court in the jurisdiction in which the land was located, to have sold same.

The bankrupt court may in a proper case order the property of a bankrupt to be sold free of encumbrance, upon a proper application to the referee by the trustee, setting forth grounds therefor, and notice and summons to secured creditors to appear and de-

fend, otherwise, if the sale is made "free of liens," it is void. The law is very well settled in this proposition.

Ray v. *Norseworthy*, 23 Wall, 128.

In re Crowell, 199 Fed. 661.

Cooney v. *Collins*, 176 Fed. 193.

Factors, etc., Ins. Co. v. *Murphy*, 111 U. S. 742.

A trustee takes no more or better title to the estate of the bankrupt than the bankrupt himself has, and it is only the title of the bankrupt that is placed in *custodia legis* by the adjudication in bankruptcy.

Fidelity Trust Co. v. *Gaskell*, 195 Fed. (8th Cir.).

Brandenburg on Bankruptcy, Section 1092.

Pugh v. *Loisel*, 219 Fed. 417.

In re Joseph Webre Co. (C. C. A. 5) 219 Fed. 417.

In the above case the court said:

"We think it is apparent that the bankruptcy act as a whole contemplates the taking possession and control of the bankrupt's estate by the court of bankruptcy, acting through its trustee. The property is taken into custody in the condition it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of the petition, of course, does not disturb such liens; but neither the existence of such liens nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that

purpose constitutes obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it."

Mr. Justice Sanford, while District Judge of the Eastern District of Tennessee, in the case of *In re Star Ice & Coal Company*, 252 Fed. 301, says:

"Under section 70 of the bankruptcy act the trustee is vested only with the bankrupt's title to property, hence, where the bankrupt's property is subject to a mortgage or other encumbrance, the trustee takes only the bankrupt's equity therein subject to such encumbrance, and since under section 67 of the act the validity of the pre-existing liens is not effected, the lien-holder, unless restricted by the order of the bankruptcy court, may enforce the same *dehors* the court."

Ward v. *First Nat. Bank of Ironton* (6th Cir.) 202 F. 609.

THE TEXAS BANKRUPT COURT COULD ONLY SELL THE LANDS IN QUESTION BY ANCILLARY PROCEEDINGS IN THE WESTERN DISTRICT OF ARKANSAS, AND THE MORTGAGEE HAD A RIGHT TO RESORT TO ANY COURT THAT HE COULD HAVE RESORTED TO BEFORE BANKRUPTCY.

In the case of *Skilton* v. *Codington*, a well considered case from the Court of Appeals of New York, reported in the 77 Northeastern, page 790, and which case was quoted with approval by Mr. Chief Justice

Fuller in the case of *Frank* v. *Vollkommer*, 205 U. S. 521, the opinion being by Chief Justice Cullen. The facts in that case are that a chattel mortgage was executed on October 4, 1897, by Wm. J. Barron to Skilton and his deceased partner for some $6,000. Afterwards bankruptcy intervened, and the trustee in bankruptcy, under an order of the bankrupt court, sold all of the property covered by this mortgage free of liens, reserving $2,600 for the benefit of any liens or claim that might be established on the property sold and stock of fixtures of the bankrupt. Thereupon the plaintiff brought suit in the Supreme Court to recover the amount due him on the note and mortgage and for foreclosure, and judgment was awarded for the plaintiff, and an appeal was taken by the trustee in bankruptcy to the Court of Appeals of New York, and in that case it is said:

> "The first contention of the appellant is that the State court had no jurisdiction of the cause of action, because the fund was in the possession of the bankrupt court. We think it had jurisdiction of an action to determine and establish the plaintiff's lien. It is settled by the decision of the Supreme Court of the United States in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, that the bankrupt court, except by the consent of the parties, has not jurisdiction to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted either in the State courts or in the Circuit Court of the United States, if the citi-

zenship of the parties authorizes the action to be maintained in the latter tribunal. See also *First Nat. Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051. While it is not so certain that that rule obtains its full integrity as to a suit brought against trustees in bankruptcy, we think it was the intention of the Bankrupt Act to allow adverse claimants to property or parties claiming liens to establish their rights by suits in courts of plenary jurisdiction, and not to subject such claims to summary disposition in the bankrupt court, unless it may be when the claims are frivolous or made in bad faith. In *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403, it was said: 'The opinion seems to have been quite prevalent in many quarters at one time that, the moment a man is declared a bankrupt, the district court which has so adjudged draws to itself by that act not only control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance, and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause and dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions.' This statement is quoted with approval by Judge Gray, in *Bardes*

> v. *Howarden Bank, supra.* Of course we do not mean to assert that, under the judgment of the State court, the fund or property could be taken from the possession of the bankruptcy court; the contrary is the law. It may also be that the bankrupt court could have enjoined the prosecution of this action, but it has not done so. Apparently it has permitted the plaintiff to assert his claim by a plenary suit in a court of general jurisdiction, and we may assume that the bankrupt court will give effect to any judgment recovered therein."

The appellant could only maintain suit to sell the land in controversy by either ancillary proceedings in the District Court of the United States for the Western District of Arkansas, as the lands were located in that jurisdiction, or by plenary suit, and if he sought to sell free of liens he would necessarily have to bring the mortgagee into that court by proper process, but if the mortgagee institutes proceedings in the court having jurisdiction as in this case, and the trustee enters his appearance, he is in court for all purposes, and the court of plenary jurisdiction has a right to determine the lien and render a decree of foreclosure for its satisfaction, and the consent of the bankrupt court is unnecessary, and especially is this true where the validity of the lien or mortgage is unquestioned by the trustee.

In a well considered case from the Court of Civil Appeals from the State of Texas, delivered March 1, 1902, in the case of *W. C. Belcher Land Mortgage Company* v. *Bush*, 67 Southwestern 444, in which the cases herein cited were cited, it was said:

"Where a lien against a debtor's property which is acquired more than four months before bankruptcy and which is otherwise valid is sought to be foreclosed, such foreclosure cannot, as a rule, be stayed by the Federal court. The trustee takes the property of the bankrupt subject to all valid liens, and while unsecured creditors having claims are parties to the proceeding, it must be remembered that the secured creditor as such is not a party to the bankruptcy proceedings, because if his security is valid the court has no control over him, nor can he share in the assets without surrendering his security. (Sec. 57 Bankr. Act 1898) providing for the determination of the value of the security held by secured creditors and for the payment of a dividend upon the unpaid excess of the debt over the value of the securities, would, it seems, bring a secured creditor in such case within the jurisdiction of the bankruptcy court to the extent that perhaps it might restrain proceedings to collect the lien, until the validity and value of such lien could be determined. But as presumably the determination as against an adverse claimant must be had in a State court, it would seem to be correct practice for the trustee to go by permission into that court and there obtain a stay."

Bardes v. *Bank*, 178 U. S. 524.

So far as we have been able to find, the only cases holding that the mortgagee should be brought into the bankrupt court in the jurisdiction in which he resides, is where the lien is doubtful or the amount due thereon is doubtful, and where its validity is challenged.

It is contended in this case that the trustee is in possession of the real estate sought to be foreclosed,

but it is admitted that this is wild and uncultivated timber land; his possession, at least, could only be constructive, and possibly his possession is no more than that of the possession of the mortgagee, who, under the laws of Arkansas, held the legal title.

In *Bardes, Trustee*, v. *First National Bank of Hazardville, Iowa*, 178 U. S. 524, it is said:

> "Trustees in bankruptcy appointed by the creditors of the bankrupt or by the court of bankruptcy take the place and are vested with the powers of assignees in bankruptcy under former bankrupt acts. Among the duties imposed by such trustees by section 47 are: First: Collect and reduce to money the property of the estate for which they are trustee under the direction of the court. By section 70, the trustees, upon their appointment and qualification, are vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt in all his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of creditors."

> "Sec. 23. Jurisdiction of United States and State Courts. a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act. 30 Stat. at L. 552, chap. 541."

Quoting from *Bardes* v. *First National Bank of Hawarden, supra*, it was further said:

"It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit at law or in equity, under the 2d section of the Act of 1867; and not by summary proceedings under the 1st section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt,' and 'to all acts, matters, and things to be done under and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy. *Smith* v. *Mason* (1871) 14 Wall. 419, 20 L. ed. 748; *Marshall* v. *Knox* (1872) 16 Wall. 551, 557, 21 L. ed. 481, 484; *Eyster* v. *Gaff* (1875), 91 U. S. 521, 525, 23 L. ed. 403, 405.

"The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But

it was well settled that the jurisdiction of such suits, conferred by the 2d section of the Act of 1867 upon the circuit and district courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the State courts. In *Eyster* v. *Gaff*, just cited, this court, speaking by Mr. Justice Miller, said: 'The opinion seems to have been quite prevalent in many quarters at one time that, the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not devested those courts of jurisdiction of such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not devest that of the State courts.

"Under the Act of 1867, then, the distinction between proceedings in bankruptcy, properly so-called, and independent suits, at law or in equity,

between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the district courts and circuit courts of the United States by the express provision to that effect in 2 of that act, and was not derived from the other provisions of 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the circuit and district courts of the United States, did not devest or impair the jurisdiction of the State courts over like cases."

As was said by the Court of Appeals of New York, that in a proper case the trustee in bankruptcy may go into court within the jurisdiction of the lands, and, for a reasonable time and upon a proper showing, stay the proceedings of foreclosure which has been started after bankruptcy, but under the decisions herein cited, if the validity and amount of the mortgage lien is unquestioned, then the courts will refuse to stay the proceeding, and we have failed to find a single case contrary to this proposition. *W. C. Belcher Land Mortgage Company* v. *Bush, supra;* but this is the only recourse that the trustee has, and that must be by suit and injunction in a court of plenary jurisdiction.

In re Holstein Harvey Inc. (D. C.) 26 Fed. (2) 798.

But the trustee does not follow that remedy laid down for him in this suit.

In the case of *Whitney* v. *Barrett* (C. C. A. 5th) 28 Fed. (2) 760, in discussing the rights of the mortgagees and the trustee, says:

> "A plenary suit is necessary to determine the question of right of possession. *Harrison* v. *Chamberlin*, 271 U. S. 191. The plaintiff in the State court was asserting and attempting to enforce a lien obtained more than four months prior to the bankruptcy proceedings, and was entitled to proceed in the State court without interference by the bankruptcy court. The jurisdiction of the State court was not lost by the bankruptcy proceeding. *Brown Shoe Co.* v. *Wynne* (C. C. A.), 281 Fed. 807."

The facts in this case get down to the proposition that the appellee held a mortgage on the lands in question given years prior to bankruptcy. The trustee obtained no greater title to the property than the bankrupt had, which was an equity of redemption, and no more. The rights of the mortgagee to foreclose his lien long after default was made unaffected by bankruptcy. He was possessed of the legal title. The trustee does not question the validity of the amount of the mortgage lien. The bankrupt court of the Northern District of Texas was without jurisdiction to sell the property free of liens, without an ancillary proceeding in the bankrupt court in the district in which the lands were located. That course was not taken. There was no valid defense interposed to the petition of foreclosure. If there was a large equity in the lands, as contended by the trustee, and the validity of the appel-

lee's mortgage or the amount thereof had been questioned, he could, upon a proper showing, have gone into the court of ancillary jurisdiction, which was the Western District of Arkansas is in this case, and obtained a stay for a reasonable time upon a proper showing, but he has not taken that course, but has seen fit to rest solely upon the proposition that the lower court was entirely without jurisdiction to foreclose the mortgage lien of the appellee or to make such order as was necessary to carry the decree into effect.

We respectfully submit that the cause should be affirmed.

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